DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DOUGLAS P. REGAN,
Appellant,

v.

CAROLYN REGAN,
Appellee.

No. 4D15-2644

[April 12, 2017]

Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; John L. Phillips, Judge; L.T. Case No. 2007DR007886XXXXNB.

Matthew S. Nugent, Adam M. Zborowski and Curt Sanchez of the Law Offices of Nugent, Zborowski & Bruce, North Palm Beach, for appellant.

William T. Viergever of Sonneborn Rutter Cooney Viergever Burt & Lury, P.A., West Palm Beach, for appellee.

PER CURIAM.

The former husband appeals an order granting his petition for modification of alimony which reduces alimony to the former wife from $9000 a month, which was agreed to in a mediated settlement, to $7800 a month, which he believes is an insufficient decrease. He contends that the court should have imputed minimum wage income to the former wife and required her to withdraw from her retirement accounts and investments to reduce his alimony obligation even further. The former wife cross appeals the trial court's decision to reduce her alimony based on her voluntary reduction of her expenses. We affirm.

In its final judgment granting the modification, the court found that the parties had originally agreed in a marital settlement agreement ("MSA") to $9000 per month in alimony to the former wife, which amount was not tied to her expenses at the time of the dissolution (an affidavit showed the former wife's expenses at the time of the dissolution were in excess of $15,000 per month). She also received investment assets and retirement

accounts, and the court determined that the parties intended that the former wife was entitled to any income derived from these assets, in addition to the $9000, and was not required to diminish that amount.

After the divorce, the former wife significantly reduced her expenses by selling the marital home, moving to a different state, and purchasing a smaller home. Because of her significantly reduced expenses, the court concluded that this constituted a substantial change of circumstances, albeit a voluntary one. The court reduced the former wife's alimony to $7800 per month, which amount will cover her expenses plus taxes. It refused to impute income to her for work, because the MSA did not contemplate that the former wife would be required to work, nor did it contemplate the former wife using any income from her assets to defray the $9000 per month obligation. Specifically, although the former husband contended that she could create a plan of early withdrawal from her retirement accounts under Internal Revenue Code section 72t (2013), the court found the evidence insufficient to show that this could be accomplished without penalty, and also insufficient to show that her use of this income to support her standard of living was contemplated in the MSA. Moreover, the former husband did not plead imputation of income or use of income from her assets to defray her expenses as grounds for reducing his alimony obligation. He only pled her decrease in expenses as a ground for reduction of his obligation. Both parties appeal this final judgment.

Section 61.14, Florida Statutes (2015), provides for the ability to modify alimony and support which was previously set in a final judgment or in an agreed settlement:

> When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, . . . or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes . . . either party may apply to the circuit court . . . for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties[,] . . . decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order.

§ 61.14(1)(a), Fla. Stat. Furthermore, the statute also instructs as to the proof necessary to obtain a modification:

> When modification of an existing order of support is sought, the proof required to modify a settlement agreement and the proof required to modify an award established by court order shall be the same.

§ 61.14(7), Fla. Stat.

Although the statute permits modification where the "circumstances or the financial ability of either party changes" and allows the court to modify alimony "as equity requires, with due regard to the changed circumstances or financial ability[,]" § 61.14(1)(a), Fla. Stat., case law has engrafted specific requirements to restrain the wide discretion otherwise given to the court in modification. *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992), summarizes these "fundamental prerequisites":

> First, there must be a substantial change in circumstances. Second, the change was not contemplated at the time of final judgment of dissolution. Third, the change is sufficient, material, involuntary, and permanent in nature.

Id. at 536 (citations omitted). Generally, the requirement of the change being involuntary has been applied when an alimony-paying spouse claims a reduction of income so that the spouse is no longer able to afford the alimony ordered or agreed: "The purpose of requiring that a change in circumstance be involuntary to modify support is to ensure that the duty to furnish adequate support is not deliberately avoided." *Vasquez v. Vasquez*, 922 So. 2d 368, 372 (Fla. 4th DCA 2006); *see also Overbey v. Overbey*, 698 So. 2d 811, 814 (Fla. 1997).

Nevertheless, courts have considered some voluntary changes in circumstances, such as retirement, as permitting modification of alimony depending upon the totality of the circumstances. *Pimm*, 601 So. 2d at 537. Also, courts have reduced an alimony obligation where the substantial change in circumstances has been a reduction of a receiving spouse's expenses. *See Wolfe v. Wolfe*, 953 So. 2d 632, 635 (Fla. 4th DCA 2007); *Antepenko v. Antepenko*, 824 So. 2d 214, 215 (Fla. 2d DCA 2002).

This case presents one of those circumstances. Given the broad discretion which section 61.14(1)(a) gives the trial judge to make a reduction, "as equity requires with due regard to the changed

circumstances," the trial court did not abuse its discretion in reducing alimony where the former wife had cut her expenses by more than half, as a result of moving to another state and reducing the size of her home.

Nor did the court abuse its discretion in failing to impute income to the former wife for employment. She had not been employed outside the home for the entire marriage and the MSA did not either specifically or impliedly require the former wife to work to support herself. Thus, the court was merely giving effect to the MSA in not imputing income to the former wife to reduce the former husband's obligation. Had the parties intended to impute income to the former spouse for purposes of support, they should have put a provision in the MSA, as was done in *Giorlando v. Giorlando,* 103 So. 3d 247 (Fla. 4th DCA 2012), and *Schmachtenberg v. Schmachtenberg*, 34 So. 3d 28 (Fla. 3d DCA 2010). Without it, the court did not abuse its discretion in refusing to impute income to the former wife.

As to the court's refusal to consider income the former wife could generate by withdrawing income from retirement accounts or other investment accounts, the court found that the MSA never contemplated the use of these funds for the former wife's support. Any income generated from those funds was for the wife to spend as she wished. Further, the former husband failed to prove that the retirement funds could be accessed without penalty. While former husband cites to *Niederman v. Niederman,* 60 So. 3d 544 (Fla. 4th DCA 2011), for the proposition that a court can look to retirement accounts as a source of income even prior to retirement, in that case, we held that the court did not abuse its discretion in considering the former wife's ability to withdraw from the retirement account without penalty in determining her income potential. We noted, however, that such withdrawals would not be appropriate where they required withdrawal from principal. In this case, the expert testified that some of the calculations would invade principal. Furthermore, in *Niederman*, we also noted that the use of such income was not *required* in determining the resources available to the alimony receiving spouse: "[A]fter consideration of the evidence presented, the court could decline to impute income from retirement accounts for equitable considerations to do justice in the case." *Id*. at 550. In this case, the court declined to do so, and that was well within the court's discretion based upon consideration of all the circumstances of this case.

For the foregoing reasons, we affirm the final judgment granting modification.

GERBER and KUNTZ, JJ., concur.
WARNER, J., concurs in part and dissents in part with opinion.

WARNER, J., concurring in part and dissenting in part.

Because the former wife *voluntarily* reduced her standard of living to allow her more income to spend on items not directly associated with her living expenses, I would reverse the trial court's reduction of the former wife's *agreed* alimony. As noted in the majority opinion, in order to modify an alimony award, the moving party must show that there has been a substantial change in circumstances which was unanticipated, material, *involuntary*, and permanent. *Pimm v. Pimm,* 601 So. 2d 534, 535 (Fla. 1992). I would hold that a voluntary reduction in an alimony-receiving spouse's standard of living is not a ground for reducing an agreed alimony award.

Although the majority cites to two cases in which a voluntary reduction in expenses by an alimony-receiving spouse constituted a change in circumstances sufficient to warrant a reduction in alimony, both are factually distinguishable. In *Antepenko v. Antepenko*, 824 So. 2d 214 (Fla. 2d DCA 2002), the court had awarded alimony to the wife in the final judgment. Later, the former wife sought and obtained an increase of alimony based upon her increased needs. *Id.* at 214. Some years later, the former husband petitioned for a downward modification of alimony on the ground that the former wife's needs had decreased significantly. *Id.* The trial court denied the modification, and the former husband appealed. *Id.* at 215. The appellate court recited the prerequisites for a modification, including the requirement that the change be substantial, permanent, and involuntary. *Id.* Noting that the former wife's needs had decreased by thirty-eight percent from the amount of her needs at the time that the modification increasing alimony was entered, the court concluded that the trial court abused its discretion by not modifying alimony where the former wife's decreased needs constituted a substantial change in circumstances. *Id.*

What is unclear from the opinion in *Antepenko* is whether the former wife's decreased needs were still above the standard of living established in the marriage. It appears in the opinion that her needs were still greater than the original award of alimony in the final judgment but less than the amount of the increased alimony she had been awarded later. *Id.* Thus, *Antepenko* does not appear to address the issue of whether a voluntary reduction of the standard of living constitutes a change in circumstance which would permit a reduction of agreed alimony.

In *Wolfe v. Wolfe*, 953 So. 2d 632 (Fla. 4th DCA 2007), we reversed the denial of a petition for downward modification of alimony because the trial court had refused to consider the sale of the marital home as a substantial change in circumstance, where it was contemplated at the time of the final judgment. *Id.* at 637. Additionally, the trial court erred in refusing to consider the former wife's decreased expenses after she purchased a smaller replacement home. *Id.* Because the alimony in the final judgment had been set based upon the expenses of living in the marital home when it was contemplated at the time of the final judgment that the home would be sold, we determined that her decreased expenses as a result of the sale should be considered. *Id.* at 635.

This, too, is substantially different than the facts of this case. Here, the $9000 per month in alimony was not awarded by the trial court based upon the standard of living of the parties. Instead, the parties agreed to the amount, which was considerably less than the amount set in the former wife's original financial affidavit, which was an exhibit to the MSA. The former husband attached no "strings" to this agreed alimony. How the former wife spends her income from this *agreed* amount of alimony should not be a ground for reduction. *See, e.g.*, *Tinsley v. Tinsley,* 502 So. 2d 997 (Fla. 2d DCA 1987).

The former husband contends that to allow the former wife additional monies, some of which she puts into a bank account, provides her with a "savings component" to alimony, rejected in *Mallard v. Mallard,* 771 So. 2d 1138 (Fla. 2000). *Mallard,* however, involved an initial award of alimony by the trial court. *Id.* at 1139. The parties presented evidence of the amount necessary to cover the wife's recurring expenses and also of an amount which was deemed "savings alimony," as the parties throughout their marriage had always saved a portion of their income. *Id.* The supreme court held that the trial court erred by including "savings alimony" in the calculation of alimony, noting that "[t]he purpose of permanent periodic alimony is to provide for the needs and necessities of life for a former spouse *as they were established during the marriage of the parties.*" *Id.* at 1140 (emphasis added). It rejected a "savings" component to alimony, stating that the court may not factor in speculative post-dissolution savings based upon a marital history of frugality. *Id.* at 1141.

In the case before us, the parties *agreed* to the amount of alimony to assist in supporting the lifestyle of the former wife as it was established during the marriage. There was no savings component to the alimony as agreed. In fact, the financial affidavit attached to the MSA shows that it was significantly less than what would have been required to support the

former wife up to the standard of living of the parties. That the former wife voluntarily decided to reduce her standard of living after the divorce, in order to make funds available either to save or to spend, was her decision. The husband should not benefit because the wife has chosen to spend her money differently after the divorce than she did prior to divorce. The principle of *Mallard* has no application in these circumstances. To hold otherwise creates disincentives for an alimony-receiving spouse to save for his or her old age or for health care expenses—sometimes holding back on expenditures in the present to make sure resources will be available in the future.

If either party to an MSA thinks that the alimony-receiving spouse should not be allowed to spend an agreed award of alimony as he or she wishes, then the parameters of that spending discretion should be included in the settlement agreement. Where such a provision is not included, I would hold that a voluntary reduction of expenses by an alimony-receiving spouse is not a substantial change of circumstance which would support a reduction of agreed alimony.

In all other respects, I agree with the majority opinion.

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Not final until disposition of timely filed motion for rehearing.